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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BARRY BONDS, Defendant.	No. CR 07-0732-SI **UNITED STATES' OPPOSITION TO DEFENDANT'S RENEWED MOTION TO EXCLUDE HOSKINS TAPE RECORDING** Date: February 11, 2011 Time: 11:00 a.m. Judge: Honorable Susan Illston

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I. INTRODUCTION

The United States opposes the defendant's January 7, 2011 renewed motion in limine to exclude a digital recording of the defendant's steroid supplier, Greg Anderson ("Anderson"), wherein Anderson discusses his administration of illegal anabolic steroids to the defendant with the defendant's then-manager, Steve Hoskins ("Hoskins"). This Court should not entertain the defendant's motion for reconsideration of its now two-year-old ruling admitting portions of the recording as statements against interest of an unavailable witness, pursuant to Fed. R. Evid. 804(b)(3), because it was filed in violation of the Local Rules. If this Court is inclined to revisit the admissibility of Anderson's recorded statements, this Court should admit all three portions of the recording, which all meet the requirements for admission under Rule 804(b)(3).

II. FACTS

A. Anderson's Recorded Statements

Hoskins was the defendant's friend since childhood and the defendant's personal assistant for many years beginning in approximately 1993. During the course of their relationship, Hoskins learned firsthand, through both observation and conversations with the defendant, that the defendant was acquiring and using anabolic steroids with Anderson's assistance. Hoskins subsequently decided to discuss the defendant's steroid use with the defendant's father. According to Hoskins, the defendant's father did not believe that his son was using steroids, so in order to convince the defendant's father, Hoskins decided to record a conversation with Anderson wherein Anderson discussed the defendant's steroids use and the fact that Anderson assisted the defendant with steroids.

According to Hoskins, the recorded conversation took place between himself and Anderson in approximately March of 2003 in the Giants clubhouse at PacBell Park near the defendant's locker. They were having the conversation in normal voices until another player walked by them, at which point they started to whisper. Hoskins recorded the following statements, labeled Part A, Part B, and Part C during his conversation with Anderson:

PART A

Hoskins: You know, um, when Barry's taking those shots, Dr. Ting said that one of, one of the basketball players….he's was taking them shots, and doing it in his thigh….and he's…oh shit...it's fuckin'….

Anderson: Oh, I know. Yeah, you can't even, you can't even walk after that.

Hoskins: Yeah, no, he said he had to go in and graft his…

Anderson: Oh yeah, you know what happened? He got uh…

Hoskins: He must have put it in the wrong place.

Anderson: No, what happens is, they put too much in one area, and what it does, it 'ill, it 'ill actually ball up and puddle. And what happens is, it actually will eat away and make an indentation. And it's a cyst. It makes a big fuckin' cyst. And you have to drain it. Oh yeah, it's gnarly…Hi Benito…oh it's gnarly.

Hoskins: He said his shit went….that's why he has to, he had to switch off of one cheek to the other. Is that why Barry's didn't do it in one spot, and you didn't just let him do it one time?

Anderson: Oh no. I never. I never just go there. I move it all over the place.

. . .

Hoskins: Yeah, that's why he was like…(laughs) he was like, tell Greg if he's puttin' it in one fuckin' place, to tell him to move that shit somewhere else.

Anderson: Oh, no, no, no. I learned that when I first started doing that shit….sixteen years ago…because uh…guys would get a gnarly infections…and it was gross…I mean, to the point where you had to have surgery just to get that fuckin' thing taken out.

PART B

Hoskins: What if they decide that…I think, didn't they say they're going to test…um…they don't know. They're not testing the players yet. They're just doing random shit. So they're just going to get a percentage. And then after they figure out the percentage…then if it's high enough, then they'll do whatever.

Anderson: Well, what, what I understand is that, what they're doing is they're…um…they're, they did 25 players, random, supposedly, in spring training.

Hoskins: Oh, so you don't even…

Anderson: And then, so those guys have already been tested twice. They got tested, then a week later they got tested again. Same guys. So what happens is, is those guys are pretty much done for the year.

Hoskins: Okay

Anderson: They don't ever have to get tested again. Now supposedly, there's gonna to be three guys…excuse me, not three…one hundred and fifty guys tested during, random during the season…Which he's going to be on that list, easy….

Hoskins: Oh yeah, definitely.

Anderson: So, in that…after…but they're going to test him once, then test him again. And then after, he supposed to be…

Hoskins: But do we know?

Anderson: Do we know when they're going to do it?

Hoskins: Yeah. Does he know?

Anderson: I, I, I have an idea. See I gotta…, where, where the lab that does my stuff, is this lab that does entire baseball…

Hoskins: Oh okay. Oh the same…

Anderson: Yeah. So, they…I'll know…I'll know like probably a week in advance, or two weeks in advance before they're gonna do it. But it's going to be in either the end of May, beginning of June. It's right before the All-Star break definitely. So after the All-Star break…fucking, we're like fucking clear as a mother.

Hoskins: Okay, so what you want…so they'll…the guys from Major League Baseball….so baseball will tell, you'll know when they're gonna do it, but you won't know exactly if it's gonna be him.

Anderson: Right.

Hoskins: Or will you know…

Anderson: He may not even get tested.

Hoskins: Right, that's what I'm saying.

Anderson: Because it's supposed to be computerized.

Hoskins: But we just know if….he's gonna be….

PART C

Anderson: He's gonna be. But the whole thing is…everything that I've been doing at this point, it's all undetectable.

Hoskins: Right.

Anderson: See, the stuff that I have…we created it. And you can't, you can't buy it anywhere. You can't get it anywhere else. But, you can take it the day of and pee…

Hoskins: Uh-huh.

Anderson: And it comes up with nothing.

Hoskins: Isn't that the same shit that Marion Jones and them were using?

Anderson: Yeah same stuff, the same stuff that worked at the Olympics.

Hoskins: Right, right.

Anderson: And they test them every fucking week.

Hoskins: Every week. Right, right.

Anderson: So that's why I know it works. So that's why I'm not even trippin'. So that's cool.

B. This Court's February 2009 Ruling

The defendant previously moved to suppress these same recorded statements, and in February 2009, this Court held that portions of the recording were admissible as statements against penal interest pursuant to Fed. R. Evid. 804(b)(3). Specifically, the Court found that the first and last parts of the recording (identified as parts "A" and "C") were admissible because a trier of fact could find that they referenced Anderson's administration of illegal substances to the defendant. The Court accordingly found these portions of the recording admissible subject to the government's ability to lay a foundation at trial that Anderson was referring to illegal conduct when he described the drugs he gave to Bonds.

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III. ARGUMENT

A. This Court should dismiss the defendant's motion for failure to comply with the Local Rules governing the filing of a motion for reconsideration

Defendant's motion, captioned as a "renewed" motion in limine, is plainly a motion for reconsideration of a long-settled issue in this case. This District's Local Rules prohibits a party from filing a notice for reconsideration "without first obtaining leave of Court to file the motion." Civ. L. R. 7-9(a) (motions for reconsideration); Crim. L. R. 2-1 (applying Civil Local Rules to criminal context). The defendant failed to obtain, or even request, leave of this Court to file his motion for reconsideration. His failure to abide by the Local Rules should result in this Court's unwillingness to entertain his motion.

Moreover, the defendant's papers do not provide this Court with grounds to grant him leave to file for motion for reconsideration of the Court's order admitting Anderson's recorded statements against interest. The Local Rules require a party moving for leave to file a motion for reconsideration to show that: (1) a material difference in fact or law exists from that was presented to the Court before entry of the interlocutory order for which reconsideration is sought, (2) new material facts emerged or a change of law occurred after the order, or (3) there was a "manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order." Civ. L. R. 709(b). The defendant does not meet any of these conditions. He has not even asserted, much less demonstrated, that the material facts or law have changed since this Court originally resolved the motion. Nor has he shown that this Court failed to properly consider the material facts and legal arguments originally presented to it.

As the Ninth Circuit has stated, motions to reconsider, while allowed, are an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotations and citations omitted); *cf. Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.1993) ("a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case"). This Court should not entertain the defendant's repetitive motion to reconsider the admissibility of Anderson's recorded statements.

B. All three parts of Anderson's recorded statements are admissible as statements against interest of an unavilable witness under Fed. R. Evid. 804(b)(3)

Should this Court reconsider the admissibility of Anderson's recorded statements, in spite of the defendant's failure to abide by the Local Rules, this Court should conclude that all three parts are admissible under Fed. R. Evid. 804(b)(3).

Rule 804(b)(3) provides for the admissibility of statements when the proponent shows that (1) the declarant is unavailable as a witness, (2) the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and where the statement is offered to exculpate the accused, (3) corroborating circumstances clearly indicate the trustworthiness of the statement. Fed. R. Evid. 804(b)(3); *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003).

i. Anderson is unavailable as a witness to testify about the subject matter in his recorded statements

There is no question that all three parts of the recording are of Anderson, and that Anderson is unavailable as a witness because he "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." Fed. R. Evid. 804(a)(2). Anderson has resisted this Court's contempt findings and refuses to testify as a witness, despite any valid privilege to withhold his evidence. He is unavailable as a witness under Rule 804(b)(3). More specifically, the government seeks Anderson's testimony regarding his providing and administering steroids to the defendant, which would tend to prove that the defendant lied to the federal grand jury by denying that Anderson ever gave him steroids. The recorded statements concern this precise subject matter.

ii. The recorded statements were against Anderson's interest

"Whether a statement is in fact against interest must be determined from the circumstances of each case" and "can only be determined by viewing it in context." *Williamson v. United States*, 512 U.S. 594, 601-03 (1994). In this case, the circumstances, purpose, topic, and context of the recorded conversation show that Anderson's recorded statements subjected him to criminal liability.

a. Part A

Part A contains Anderson's statements that he gave the defendant injections of anabolic steroids. An injection is the ultimate form of distribution and so also was illegal and subjected Anderson to criminal liability. Anderson knew this, and so hushed his voice when someone other than Hoskins walked by. That Anderson was subjecting himself to the risk of criminal liability was also evident in the cadence and parlance that Anderson chose to speak in. He did not reference the steroids as "steroids," but used disguised language, namely "that shit."

The defendant suggests that it is not clear that the injections Anderson discusses in the recorded statements are of steroid injections. Def. Renewed Mot. In Limine to Exclude Hoskins Recording at 3-4. On the contrary, the context and substance of the conversation make clear that Anderson was talking about injecting the defendant with anabolic steroids. In fact, the topic was chosen by Hoskins and introduced to Anderson for the very purpose of discussing anabolic steroids. Anabolic steroids are commonly injectable, and the administration of these drugs on a regular basis, called "cycles," requires a certain level of expertise and knowledge which Anderson possessed. *See* Declaration of Jeff Novitzky, attached as Exh. A, ¶ 4. Steroids are often injected in the buttocks and the legs, consistent with Anderson's reference to injecting Bonds in the thigh. Anderson's statement "you can't even walk after that" describes a classic side effect of steroid injections, as do the references to: the tendency of a steroid injection to "ball up and puddle," to "make an indentation," and to make a "cyst" which would require draining. *Id.* at ¶ 4. The technique of having to "switch off of one cheek to the other" refers to injections in the buttocks and the approach by experienced and heavy steroid users and distributors of injecting in different parts of the body in order to avoid side effects. *Id.* at ¶ 4. Anderson's statement, "I move it all over the place" also responds to this concern and refers to the tactic of moving the steroid injections to different parts of the body.

These facts are further corroborated by Hoskins, who will testify that not only was the subject matter of the recorded conversation Anderson's distribution of illegal anabolic steroids to the defendant and other baseball players, but also that anabolic steroids was the context of their entire discussion.

In its February 2009 ruling, this Court observed that a trier of fact could conclude that the substance Anderson was injecting (Part A) was the same as the "undetectable" performance-enhancers Olympic athletes used and that Anderson admitted to administering to the defendant in Part C. The defendant points out that the substances referenced in Part C are likely the "clear" and "cream," which are not injectable. Def. Renewed Mot. In Limine to Exclude Hoskins Recording at 8. It should be noted that the "clear" contained tetrahydrogestrinone, an anabolic steroid that, at the time of Anderson's statement, was illegal as being "chemically and pharmacologically related to testosterone" under 21 U.S.C. § 802(41)(A), and which is now specifically listed in 21 U.S.C. § 802(41)(A)(xlviii), and the "cream" contained testosterone, an anabolic steroid that, at the time of Anderson's statement, was illegal under 21 U.S.C. § 802(41)(A)(xxvi). The distribution of the "clear" or the "cream" was also illegal under the FDA Act's misbranding statutes. 18 U.S.C. 331, 333. Accordingly, it was illegal under federal law in 2003 to distribute either the "clear" or the "cream." While the Court's February 2009 decision might have referred to the substances in Part A and Part C as the same, this should not affect this Court's finding that Anderson's statements in Part A subject him to clear criminal liability. The substances Anderson admitted to distributing in Part A were illegal, Anderson knew this at the time, but yet discussed it with a Bonds-inner-circle member – Hoskins – as a way of alleviating concern that Bonds would suffer side effects from the steroid injections..

b. Part B

Part B of Anderson's recorded statements indicate that Anderson structured his steroid regimen for the defendant to avoid Major League Baseball ("MLB") testing. Anderson explained that he would know "probably a week in advance, or two weeks in advance before" MLB conducted a round of random testing, and that "I have an idea" of whether the defendant would be one of the people being tested, apparently based on Anderson's laboratory contacts. This was an admission that Anderson was administering steroids to the defendant, which was illegal, and that he was trying to avoid its detection. This statement subjected Anderson to criminal liability.

Even if this Court finds that Part B is not as directly inculpatory as Parts A and C, it should still admit Part B. As the Ninth Circuit held in *United States v. Paguio*, 114 F.3d 928,

933-34 (9th Cir. 1997), a district court should not "always parse the statement and let in only the inculpatory part," but should examine the statement in context "to see whether as a matter of common sense the portion at issue was against interest and would not have been made by a reasonable person unless he believed it to be true." Since Part B also provides context for Part C in that Anderson explains that he specifically uses undetectable steroids in order to avoid detection by MLB testing, it should also be admitted under general principles of completeness. *Cf.* Fed. R. Evid. 106.

c. Part C

As conceded by the defense, Part C of Anderson's recorded statements is a discussion of the "cream" and the "clear." The "cream" was an illegal testosterone-based anabolic steroid which Bonds admitted taking. Def. Renewed Mot. In Limine to Exclude Hoskins Recording at 9. The "clear" was an illegal designer steroid which Bonds also admitted taking. Anderson explained to Hoskins that these drugs were undetectable, that you "can't get them anywhere else,"and further stated that the drugs were the "same stuff" Marion Jones used in connection with her training and participation in the 2000 Olympics. (Jones subsequently entered a guilty plea in the Southern District of New York in which she admitted lying to federal agents about using the cream and the clear in the 2000 Olympics).

The "clear" contained tetrahydrogestrinone, an anabolic steroid that, at the time of Anderson's statement, was illegal as being "chemically and pharmacologically related to testosterone" under 21 U.S.C. § 802(41)(A) (and which is now specifically listed in 21 U.S.C. § 802(41)(A)(xlviii)), and the "cream" contained testosterone, an anabolic steroid that, at the time of Anderson's statement, was illegal under 21 U.S.C. § 802(41)(A)(xxvi). The distribution of the "clear" or the "cream" was also illegal under the FDA Act's misbranding statutes. 18 U.S.C. § 331, 333. In fact, Anderson pled guilty before this Court to those very charges.

iii. Anderson's recorded statements bear indicia of trustworthiness

Although there is "a question whether the third requirement [corroborating circumstances clearly indicating trustworthiness] applies when a declaration against penal interest is offered to inculpate rather than exculpate an accused," *United States v. Holland*, 880 F.2d 1090, 1093-94 (9th Cir. 1989) (listing factors showing reliability of statement), all three parts of Anderson's

recorded statements are trustworthy, and so meet the third criteria for admission under Fed. R. Evid. 804(b)(3), if applicable.

United States v. Boone, 229 F.3d 1231, 1232 (9th Cir. 2000), held that a tape recorded statement was properly admitted under Fed. R. Evid. 804(b)(3) where "[u]nbeknownst to Lamar Williams, his girlfriend Tarchanda Cunningham surreptitiously tape recorded him implicating himself and Defendant Anthony Boone in an armed robbery." The Ninth Circuit specifically found that "the circumstances attendant to the making of Williams's self-incriminating statements provide a particularized guarantee of trustworthiness." *Id.* at 1234. At the time the recording was made, Williams was confiding in his girlfriend/co-conspirator and had no motive to shift the blame to someone else or to minimize his own culpability. Williams was charged as a co-conspirator, but remained at large at the time of trial, and Cunningham was cooperating with the F.B.I. when she recorded the conversation. *Id.* at 1232. "Here, the taped conversation between Williams and his girlfriend occurred in what appeared *to Williams* to be a private setting and in which, as far as *he knew*, there was no police involvement." *Id.* at 1234 (original emphasis). "Williams's lack of exculpatory motive while inculpating himself provides the circumstantial guarantee of reliability that underpins the hearsay exception for statements against interest." *Id.* at 1232.

In *Padilla v. Terhune*, 309 F.3d 614, 619 (9th Cir. 2002), the Ninth Circuit also held that statements were admissible pursuant to Rule 804(b)(3) where "[t]he speaker made his admission to Munoz, a close friend, in a private setting, with no reason to think the police would become involved, unabashedly inculpating himself while making no effort to mitigate his own conduct or to shift blame." This, despite the fact that the witness recounting the unavailable witness's statements was very young and allegedly under the influence of drugs and alcohol when he heard the statement, and testifying from memory. *Id.*

Even more so than in *Boone* and *Padilla*, the facts in this case compellingly show that the recording is trustworthy. Anderson was speaking to a close confidant, as they both served the defendant, and Anderson had no motive to shift any blame or say anything untrue about the defendant or to minimize his own involvement with the defendant's steroid use. As far as

Anderson knew, the conversation with Hoskins was private and did not involve law enforcement in any way. Unlike *Boone*, Hoskins was not cooperating with law enforcement in any way when the tape was made, a factor that increases the trustworthiness of the recorded statements. And unlike *Padilla*, at issue in this case is a recording, not a witness with perceptory and memory problems.

C. All three parts of Anderson's recorded statements are relevant

Parts A, B, C of Anderson's recorded statements all clearly pertain to his providing and administering steroids to the defendant, and so are clearly relevant to the charges the defendant faces of lying to a federal grand jury about whether Anderson provided him with steroids or ever injected him with any substance. *See* Fed. R. Evid. 401.

Nevertheless, Bonds suggests that Part C (Anderson's statements pertaining to the "cream" and the "clear") should be excluded as irrelevant because Bonds admitted using the drugs in the grand jury. This argument is meritless. Bonds's defense in this case will likely be that he took the drugs provided by Anderson and BALCO, but did not appreciate that the drugs were anabolic steroids. Anderson's knowledge that the drugs were "undetectable," and his discussion of illegally using them in the Olympics, are probative facts which tend to suggest Bonds's knowledge as to the illegality of the drugs which he received given the close relationship between Bonds and Anderson, and the government's trial proof that Anderson routinely explained to his athlete clients the nature of the drugs they were using and the ways in which to administer them.

IV. CONCLUSION

For the above-stated reasons, the government respectfully requests that the defendant's renewed motion in limine be dismissed. If this Court entertains the motion, the government asks that the motion be denied and that the Court find all three parts of Anderson's recorded statements admissible as statements against penal interest of an unavailable witness..

DATED: January 28, 2011

Respectfully submitted,

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